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No. 81-9

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON, et al.,

Appellants,

v.

SEATTLE SCHOOL DISTRICT No. 1, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

I.

Absent any constitutional duty on the part of a local school board to implement a racially-oriented mandatory bussing program, once such a program is underway, may it ever be discontinued without violating the Fourteenth Amendment?

II.

Once a racially-oriented mandatory bussing program has begun in a non-segregated school district, may the preexisting racially-neutral neighborhood school assignment policy be restored by the local school board which abandoned it, or may it be restored by the superior legislative authority of the state through enactment of a law applicable to all local school districts?

III.

Does a state statute which does not explicitly use race as a criterion nevertheless create an impermissible racial classification solely because it addresses specifically a subject which has a racial nexus?

IV.

Does statutory restoration of a neighborhood school assignment policy constitute racially discriminatory state action when accomplished in response to a mandatory bussing program designed to achieve a particular level of racial distribution of public school students deemed to be desirable by a local school board?

V.

Where record evidence shows nondiscriminatory intent on the part of voters adopting a state-wide initiative, does a district court err in finding that the legislation was motivated by an intent to discriminate on racial grounds while refusing even to consider such evidence?

VI.

Where a state statute is modeled closely on a federal

statute explicitly intended to foster a national policy in favor of neighborhood school assignment of public school students and to inhibit the use of mandatory bussing to achieve racial distribution in public schools, is there a recognized constitutional ground for upholding the federal law while striking down the state law?

VII.

Where state officials involved in implementing a state law interpret it in a manner which eliminates a particular constitutional inquiry, is it error for a federal court to interpret that law in a contrary manner, rendering it constitutionally suspect?

VIII.

(A) Are political subdivisions of a state, such as school districts, within the ambit of 20 U.S.C. § 3205 and 42 U.S.C. § 1988, so as to entitle them to attorneys' fees when they prevail in suits against the state?

(B) If political subdivisions are so entitled, does a district court abuse its discretion under those statutes by refusing to order a state to pay the attorneys' fees of school district plaintiffs upon a finding that the district's prosecution of the litigation has already been funded by that state?

PARTIES TO THESE PROCEEDINGS

All of the numerous parties of record to these proceedings are listed in footnote 2 and Appendix D to the Jurisdictional Statement (J.S. 1; J.S. D-1 through D-3), and for the sake of brevity are not reprinted herein.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANTS

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Memorandum Opinion of the U.S. District Court for the Western District of Washington, entered on June 15, 1979 are reported at 473 F.Supp 966 (J.S. A-1 through A-36). The Declaratory Judgment and Permanent Injunction entered by the District Court, is reprinted at J.A. 8-9. The District Court's Order Denying Attorneys' Fees is reprinted at J.S. C-1 through C-4. The December 16, 1980 opinion of a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit is reported at 633 F.2d 1338 (J.S. B-1 through B-29).

JURISDICTION

This appeal is primarily taken from a judgment of the Court of Appeals for the Ninth Circuit upholding a decision of the U.S. District Court for the Western District of Washington declaring invalid a Washington state statute, Initiative Measure No. 350 (now codified as chapter 28A.26 RCW), as repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Appeal is also taken from the Ninth Circuit's reversal of the District Court's denial of awards of attorneys' fees to the original plaintiff school districts and intervenors.

The Court of Appeals filed majority and dissenting opinions on December 16, 1980. A timely filed Petition for Rehearing and Suggestion for En Banc Determination was thereafter denied on March 26, 1981. (J.S. E-1).

Appeal is now taken to this Court pursuant to 28 U.S.C. § 1254(2). A copy of the Notice of Appeal was filed with the Clerk of the Ninth Circuit on May 18, 1981. (J.S. D-1 through D-6).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[1]

United States Constitution, Fourteenth Amendment (Equal Protection Clause).

Washington State Constitution, Article IX.

Initiative Measure No. 350 (now codified as chapter 28A.26, Revised Code of Washington).

20 U.S.C. 1701, *et seq.*, Equal Educational Opportunities Act of 1974).

42 U.S.C. 1988 (1976 Civil Rights Attorneys' Fees Award Act).

20 U.S.C. 3205 (allowing awards of attorneys' fees in certain educational cases).

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[1]These constitutional and statutory provisions are set out in full in the Jurisdictional Statement (J.S. F-1 through F-18).

STATEMENT OF THE CASE

1. The Historical Legal Background.

The Washington Constitution, adopted in 1889, has always provided in Article IX, § 1 that:

> "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

The state has historically fulfilled this constitutional duty through a comprehensive legislative scheme authorizing the creation of local school districts empowered by the legislature to do those things necessary to educate Washington's children. *See*, generally, Title 28A RCW; *see*, in particular, chapter 28A.57 RCW and chapter 28A.58 RCW.

In accordance with Article IX, § 1, *supra*, the State of Washington has always operated a unitary public school system. To date, no Washington school district has ever been judicially declared to have engaged in racial segregation in violation of the Fourteenth Amendment in the assignment of students in Washington's public schools. Moreover, the state legislature has consistently protected and enhanced the exercise of civil rights by all persons within the state.[2]

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[2]The creation of a comprehensive scheme of civil rights law began a full five years before this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). The statutory provisions include: RCW 9.91.010 (making it a misdemeanor to deny the full enjoyment of any public facilities by acts "directly or indirectly" causing persons of any race to be treated as not welcome); RCW 18.85.230 (prohibiting discrimination in hiring or sales activity by real estate workers and salesmen); RCW 28A.02.050 (prohibiting discrimination by any school district in employment; RCW 3.80.040 and RCW 35.81.170 (prohibiting discrimination in "urban renewal" projects); RCW 41.14.180 (prohibiting discrimination in appointments and promotions in county sheriff's offices); RCW 43.01.100 (prohibiting questions relative to any applicant's race on any application for employment in state government); chapter 49.04 RCW (providing for affirmative action improving minority race representation in trade apprenticeships). RCW 49.60.176 (prohibiting racial discrimination in credit transactions); RCW 49.60.178 (prohibiting racial discrimination in insurance transactions); RCW 49.60.180 (prohibiting racial discrimination in labor union practices); RCW 49.60.200 (prohibiting racial discrimination in employment

2. The Recent Developments Which Precipitated The Filing Of This Action.

The Seattle School District is the largest of Washington's 300 school districts. At the time of trial the District had a total student enrollment of approximately 54,000, of which 37.3% were identified as minority students. (Finding of Fact 1.1; J.S. A-1).

In early 1977, the Seattle School Board, by resolution, established criteria for determining whether a given school within the District was "racially imbalanced." Racial imbalance was defined by the board's resolution as:

> "* * * the situation that exists when the combined minority student enrollment in a school exceeds the District-wide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body." (Finding of Fact 6.9; J.S. A-17; J.A. 8).

The District thereafter developed a mandatory bussing program designed to eliminate any racial distribution of students in Seattle schools which did not conform to this standard.

When the final version of this bussing program was decided upon and scheduled to commence in the 1978-79 school year, opponents of the plan first attempted to enjoin its implementation in state court. Failing to do so, they then drafted, filed, solicited signatures for and campaigned for passage of Initiative Measure No. 350 at the 1978 General Election. The initiative was placed on the ballot and approved by the voters in each of Washington's 39 counties at that election.

Initiative Measure No. 350 provides in § 1 (now codified as RCW 28A.26.010) that:[3]

> "* * * no * * * school district * * * shall directly or indirectly require any student to attend a school other than the school which is geographically

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agency practices); RCW 49.60.215 (prohibiting racial discrimination in amusement); and RCW 49.60.222 (prohibiting racial discrimination in real estate transactions).

[3]The full text of the law is reprinted at J.S. F-2 through F-4.

> nearest or next nearest the student's place of residence * * *"

The following exceptions are then carved out of this central policy:

> "* * *
>
> "(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;
>
> "(2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's pace of residence and the nearest or next nearest school; or
>
> "(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities."

An additional exception is embodied in § 6 (RCW 28A.26.060) as follows:

> "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools."

From the outset of this litigation the state has consistently interpreted this section to allow any Washington school district to assign students away from their neighborhood schools where the state or federal constitution requires such assignment. The Attorney General continues to adhere to this interpretation.

3. Race-Conscious Programs In The Pasco And Tacoma School Districts Which Form The Basis For Involvement By Those Districts.

Aside from the Seattle School District, the Pasco and Tacoma School Districts are the only other Washington school districts which operate programs designed to alter and control racial distribution of students in their public schools.

The Pasco School District operates a one-way bussing program which it first implemented in 1965 when it closed its one predominantly-black elementary school, thereafter

bussing minority students from the so-called East Pasco area of that District to other schools in the District located outside this neighborhood. (Finding of Fact 4.3; J.S. A-9).

The Tacoma School District has no mandatory bussing program. Instead, it operates a voluntary "magnet" program at two of its schools, thereby maintaining acceptable racial distribution of students throughout the entire District. The District also adheres to an "open enrollment" policy which allows any student within the District to attend the school of his or her choice, subject to practical limitations, using the Tacoma transit system. (Findings of Fact 5.1 through 5.16; J.S. A-10 through A-14).

4. The Procedural History Of This Case.

The Seattle, Tacoma and Pasco School Districts, joined by a number of individual plaintiffs, filed the initial complaint herein on November 30, 1978. The state defendants agreed to the entry of a temporary restraining order staying implementation of the newly-enacted law pending a hearing. On February 9, 1979, the District Court, after hearing, entered a preliminary injunction and, at the same time, allowed intervention by several other parties plaintiff. The principal complaint in intervention (filed by the so-called "Seattle Intervening Plaintiffs") alleges that, regardless of the constitutionality of Initiative Measure No. 350, it cannot be applied to the Seattle School District since that District has committed past acts of *de jure* segregation. The District Court ordered that the constitutionality of the initiative (*i.e.*, on its face or as applied generally) would be taken up first ("Phase I"). It further directed that "Phase II" of the proceedings, if necessary, will be addressed to the question of whether or not the law may constitutionally be applied in any given case (*i.e.*, whether or not *de jure* segregation exists so as to preclude its application).

Trial of the so-called "Phase I" issues was held in late April and early May, 1979. On June 15, 1979, the District Court entered findings of fact and conclusions of law accompanied by a memorandum opinion. Entry of

judgment was delayed pending disposition of requests for awards of attorneys' fees. On August 29, 1979, the District Court entered its final declaratory judgment, stating, in part, as follows:

> "* * * Initiative 350 is declared unconstitutional in that it denies equal protection of the law to racial minorities in contravention of the Fourteenth Amendment to the United States Constitution in the following respects:
>
> "(a) It creates an impermissible racial classification by forbidding mandatory student assignments for racial reasons while permitting such assignments for purposes unrelated to race. No compelling state interest justifies that racial classification.
>
> "(b) A racially discriminatory intent or purpose was one of the factors which motivated the adoption of the initiative.
>
> "(c) It is overly inclusive in that it prohibits a school district from implementing a mandatory student assignment program even though the school district may be under a constitutional duty to eliminate segregation." (J.A. 8).

A Ninth Circuit panel majority affirmed the District Court, though on a limited basis, saying:

> "We find it unnecessary to discuss the District Court's holding that Initiative 350 was motivated by a discriminatory purpose and is unconstitutionally overbroad because we conclude that the statute was correctly struck down as an impermissible legislative classification based on racial criteria. *Hunter v. Erickson*, * * * *Lee v. Nyquist*, * * *" (J.S. B-4).

SUMMARY OF ARGUMENT

Clearly, a state may not maintain a neighborhood school policy as a means (for the purpose) of keeping its schools racially segregated. For that would itself be *de jure* segregation. And in such case bussing could be required — and implemented — without violating Initiative 350. *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

There are also, however, demonstrably good reasons for neighborhood schools — reasons which have made

such schools an almost universal tradition throughout not only the state of Washington but the entire nation.

Initiative 350 simply says, therefore, as a matter of state policy to local school districts:

"We the people of this state, exercising our reserved legislative authority under the state Constitution, want you to retain a neighborhood school policy,[4] as a general matter (with exceptions for special education, physical conditions, etc.) until such time as it is determined that *de jure* segregation exists.

This directive, we urge, is not unconstitutional under the Fourteenth Amendment — any more than is the similar directive of Congress under the Equal Educational Opportunities Act of 1974 (20 U.S.C. § 1701, *et seq.*, discussed below) unconstitutional under the Fifth Amendment. It does not run afoul of either *Hunter v. Erickson*, 393 U.S. 385 (1969) or *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y., 1970), aff'd 402 U.S. 935 (1971) upon which both courts below erroneously relied. Its passage does not manifest a collective intent to engage in racial discrimination under the test laid down by this court in *Washington v. Davis*, 436 U.S. 229 (1976), and its progeny. It in no way stands as an unconstitutional state barrier to the elimination of *de jure* segregation if such should be found, in any school district, to exist.

Therefore, the ruling below, holding Initiative 350 unconstitutional on its face, should be reversed.

The Court of Appeals also erred, and abused its own discretion, in reversing the District Court and awarding attorneys' fees to the three school districts. Its opinion amounts to an approval of "double dipping" by public agencies, as well as an unwarranted intrusion into the internal appropriation process of the state. As public agencies, rather than private litigants, the school districts do

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[4]By neighborhood school policy, we here mean—as did the framers of Initiative 350—a policy which, as a general proposition, allows all students desiring to remain in their own neighborhood schools (nearest or next nearest) to do so while, at the same time, permitting local school administrators to provide for attendance elsewhere on a strictly voluntary basis.

not even fall within the ambit of the attorneys' fee acts, which were intended to foster private enforcement of the civil rights laws.

ARGUMENT

I. THE DECISIONS IN *HUNTER V. ERICKSON* AND *LEE V. NYQUIST* DO NOT CONTROL THE DISPOSITION OF THIS APPEAL

The respective opinions of the District Court and the Ninth Circuit make it quite clear that both of the Courts below regarded the decisions of this Court in *Hunter v. Erickson* and *Lee v. Nyquist* to be dispositive of this case. In so doing, they seriously erred.

A. Prefatory Comments:

Some preliminary points should be noted. The oft-repeated statement that Initiative 350 "* * * forbids mandatory student assignments for racial reasons" while "* * * permitting such assignments for purposes unrelated to race" is, quite simply, incorrect. This statement both overstates and understates what the initiative actually does. First, the initiative does not prohibit all mandatory student assignments for racial reasons; it does, however, severely limit such assignments (*i.e.*, to those schools nearest and next nearest to the student's home). This point is important for a very obvious reason: If the purpose of Initiative 350 had been to prevent any increased racial balance in the schools, it certainly failed to accomplish that purpose, for it allowed mandatory assignments to the next nearest school for *any* purpose, including the achievement of greater racial balance. This is, we suggest, a strong indication that the purpose of Initiative 350 was not to prevent increased racial balance at all.

Second, the types of mandatory assignments which the initiative does in fact restrict are not confined to mandatory assignments for the purpose of achieving greater racial balance. The initiative limits mandatory assignments away from the nearest or next nearest school

except for the reasons stated in § 1(1) through (3) and § 6 of the initiative. And those exceptions *all* focus in § 1(1) through (3) on the educational, health, and safety needs of the particular students, and the inability of a particular neighborhood school to meet those needs.[5]

Reasons stemming from administrative convenience, such as the desire to fill up empty classrooms at the opposite end of a school district, the desire to achieve a balanced classroom size between the various schools in the district, either to accommodate the teaching staff or for any other reason, the desire to obtain more transportation money from the state; all these provide no escape from the initiative's limitation.[6]

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[5]Again the three exceptions are as follows:

"(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;

"(2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or

"(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities."

[6]The District Court's Finding of Fact No. 8.3 was that "[e]xcept for racial balancing purposes, Initiative 350 permits local school districts to assign students other than to their nearest or next nearest schools for *most*, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools (emphasis added)." (J.S. A-24). This Finding was specifically footnoted by the Ninth Circuit. (J.S. B-6).

The retained limitation on forced bussing to achieve balanced classroom sizes and school enrollments is, alone, quite significant. Newspaper accounts on both sides of the state just prior to the 1978 general election detailed instances of vocal opposition (by both school district officials and parents) to mandatory bussing of school children for purposes entirely unrelated to race. (Exs. A-130 and 117, Tr. 574, 937). Indeed, in the Spokane School District, a citizens committee was officially established to devise methods to prevent any necessity for bussing school children to accommodate anticipated population shifts within the district, a development which has nothing to do with race. Tr. 930-943.

Other forms of racially-unrelated extra-neighborhood bussing restricted by the Initiative are referred to, for example, in the concerns expressed by the Seattle School District's own attorneys several months prior to the 1978 General Election (Ex. A-9, Tr. 160):

The Initiative as drawn will affect more than just the Seattle

With these major features of the Initiative in mind, we turn to *Hunter* and *Lee*, to see if they are controlling.

B. The Essence Of Initiative 350 Differs Greatly From The Laws Struck Down In Hunter And Lee.

In *Hunter* the electorate in the City of Akron amended the charter of that city to provide that any ordinance enacted by the city council dealing with racial, religious or ancestral discrimination in housing would not become effective unless approved by a majority of the city voters. The charter imposed this requirement of voter approval upon no other type of ordinance. Indeed, housing ordinances dealing with issues other than discrimination in sales or rentals remained effective merely upon appraisal by the city council, just as before.

This Court found the amendment to be a denial of equal protection in that it created an explicitly racial classification, treating racial discrimination in housing differently from other matters relating to housing.

> "Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the

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School District. Many school districts in the state transport students beyond their next nearest school for various reasons including the desire to receive increased transportation funds from the state.

The arguments contained in the official voters pamphlet sent to all registered voters in the state prior to the 1978 General Election (Ex. 2, Tr. 23) likewise referred to other forms of non race-related bussing effected by the Initiative:

> 350 prohibits assignment of students outside their district; thus, it would restrict interdistrict cooperative programs.
>
> 350 would in some cases prohibit changing the grades offered in particular schools, such as converting some three-year to four-year high schools. It would prohibit most disciplinary transfers and the redrawing of school boundary lines to make efficient use of buildings. It would mean costly interference with location of special education programs.

> ballot, * * * [*the referendum provision*] *places special burdens on racial minorities within the governmental process.* * * *" 393 U.S. 385, 391 (Emphasis added.)

The obvious purpose of the ordinance was, quite simply, to place a new legal obstacle in the way of the efforts of minority groups to utilize the political process to assure them freedom of choice as to where they might live. As the Court pointed out, the majority already had that freedom of choice, and thus needed "no protection against discrimination." And the ordinance created an express racial classification by explicitly focusing on — and impeding — the efforts of minorities to avoid discrimination in housing.

Initiative 350 creates no such express racial classification. Again, it prohibits mandatory assignments outside the limits of the student's nearest or next nearest school for *any* reason, unless related to the particular student's particular needs. Further, within the geographical limits of the nearest or next nearest school, mandatory assignments for *any* reason are permitted, even for purposes of achieving greater racial balance.

The true basis for *Hunter*, it is also important to note, was emphasized in *James v. Valtierra*, 402 U.S. 137 (1971), where this Court upheld a California referendum amending that state's constitution to provide that no low-rent housing projects could be developed, constructed, or acquired until the project was approved by a majority of those voting at a community election. In reversing the lower court the Court said, at 402 U.S. 140-141:

> The court below erred in relying on Hunter to invalidate Article XXXIV. Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." * * *
>
> Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." * * * The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here

> would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. * * * The present case could be affirmed only be extending Hunter, and this we decline to do. (Citations omitted)

Like the district court in *Valtierra*, the lower courts in this case have examined a statute which was racially neutral on its face and determined that a racial classification was necessarily implied. The Court of Appeals then presumed that this implied classification was constitutionally invalid, and ended the analysis right there. No consideration of intent was needed. By extending *Hunter* and avoiding the required inquiry into intent, the lower court has effected a major shift in equal protection analysis.

In *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970), a three-judge court applied *Hunter* in striking down a New York statute which provided as follows:

> "Except with the express approval of a board of education * * * a majority of the members of such board having been elected, no student shall be assigned or compelled to attend any school on account of race * * *

Citing *Hunter*, the District Court stated at 318 F.Supp. 719:

> "The statute thus creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters * * *"

This Court, of course, affirmed the thee-judge Court's decision in *Lee*. 402 U.S. 935 (1971).

Unlike Initiative 350, the statute involved in *Lee* did not represent a legislative decision that *all* mandatory assignments were to be limited unless the needs of the particular student required it. Under that statute, every student in the district could be required to go anywhere in the district, and the concept of the neighborhood school could thereby be completely eliminated — *for any reason whatsoever save race*. The purpose of the statute, in short, was not to prohibit extra-neighborhood mandatory assignments; rather, its express terms show that its purpose was

to prohibit only racial transfers. Racial balance was bad; every other reason for mandatory assignments was good.

This critical point is made quite emphatically by the District Court's opinion in *Lee*.

> "Defendants content that the sole purpose of the statute was to give local boards, directly responsible to the people, control over the methods for achieving racial balance. The statute's salutary objective, they urge, was to assure the community acceptance necessary for the effectuation of local school desegregation. *To the extent, however, that the statute thus recognizes and accedes to local racial hostility, the existence of which has created in the past a serious obstacle to the elimination of de facto segregation, the purpose is clearly an impermissible one.* 318 F.Supp. at 719, 720. (Emphasis supplied.)

Observe, in this regard, that the ban on extra-neighborhood mandatory assignments prohibited assignments even to the next nearest school. Increased racial balance to *any* extent was the target of the statute. And observe further, in this regard, that the ban applied only in districts where the majority of the school board was *not* elected, *i.e*, in those districts in which the "local racial hostility" to increased racial balance could not exercise control on the local level.

Unlike Initiative 350 the statute in Lee, in short, did not involve any affirmation of an otherwise constitutionally permissible public policy. It simply embodied a rifle shot prohibition of racial bussing. That is the critical difference here, and the reason Initiative 350 should be upheld.

C. There Are No Burdens Imposed On Minorities By Initiative 350 In Washington School Districts.

Though *Hunter* and *Lee* are distinguishable, as shown, the broad question raised by *Hunter* nevertheless requires further examination. Does the Initiative impose "special burdens on racial minorities within the governmental process"?

Initially, it seems manifest that no "special burden" is

imposed on anyone in particular in those 297 Washington school districts where few, if any, extra-neighborhood assignments are presently being made for any purpose. Many of these districts have only one school facility serving students at a given grade level. And, in particular, it cannot be said that a "special burden" is somehow imposed upon minority students in those several Washington school districts having five or more schools which are already racially balanced on a school-by-school basis through simple application of Washington's traditional neighborhood school assignment policy, and which have minority enrollments in excess of the statewide average.[7]

Even as to the three school districts which are parties to this appeal, however, it is simply impossible to define and articulate any "special burden" imposed on minorities in those districts.

1. No Burdens Are Imposed On Minorities In The Pasco School District.

Consider, first, the situation in the Pasco School District. Ironically, the effect of Initiative 350 when implemented in Pasco will be entirely salutary because it will actually require discontinuance of invidious racial discrimination which has occurred and which continues to occur there.

The situation in the Pasco School District is markedly similar to that dealt with by the Sixth Circuit in *NAACP v. Lansing*, 559 F.2d 1042 (6th Cir. 1977), where the Court pointed out at 559 F.2d 1052:

> "* * * Of the total black enrollment in Lansing elementary schools, 77% of the students attended * * * four schools. The Board of Education's response to the increasing segregation in the elementary school system furnishes additional indicia of de jure segregation. * * * The integration effort was accomplished by phasing out and closing the predominantly black schools, * * * and transporting the pupils to outlying white schools. The District Court

[7] *See*, Ex. A-93(g) for school-by-school minority enrollments in the following school districts: Prosser, Grandview, Sunnyside, Toppenish, Wapato, Moses Lake, Quincy and Clover Park.

> found that 'the "one-way busing" program adopted by the Lansing Board of Education caused the burden of desegregation to fall disproportionately on Blacks. It also had the effect of keeping the "neighborhood school policy" a reality for Whites, while making it chimerical for Blacks.' * * * We therefore affirm the District Court's finding that the one-way busing of black children beginning in 1965 and continuing to the present, without a corresponding effort to spread the burden of integration more equitably through the system, is an act of de jure segregation."

If anything, though, the situation in the Pasco School District is worse than that which the Sixth Circuit found deplorable in Lansing. Minority parents in East Pasco initially refused to volunteer their kindergarten children to attend the newly-opened Livingston Elementary School (a predominantly White school far removed from the East Pasco area) and the District found it necessary to adopt a regulation *requiring* those minority kindergarten children to attend that school. (J.A. 30-31). Dr. Childers then reinforced the fact that these sentiments still exist when he pointed out that if Initiative 350 is allowed to be implemented in the Pasco School District, minority students in the East Pasco School District area would opt to attend those two or three schools which are closest to their neighborhood. (J.A. 53).

The terrible irony here, then, is that the Pasco School District has historically implemented the central policy of Initiative 350 for its white students and their parents, but, since 1965, it has denied it to minorities. In light of these considerations, the School District's posture before this Court smacks of utter hypocrisy. Implementation of Initiative 350 in Pasco will rescind those policies and practices which have, for years, manipulated unwilling minority students. Thus, based on the evidence presented at trial, it seems absurd to suggest that a "special burden" would be imposed on minorities in Pasco by Initiative 350. In fact, the initiative will force removal of "special burdens" already imposed on minorities in Pasco by the School District itself and permit mandatory bussing of majority students, to their next-nearest school.

2. No Burdens Are Imposed On Minorities In The Tacoma School District.

Any suggestion that special burdens will be imposed on minorities in the Tacoma School District by Initiative 350 is also amiss. Initiative 350 will simply have no impact whatsoever on that District's well-established and successful voluntary magnet school program.

The Tacoma School District's magnet school program consists, in essence, of special enriched academic opportunities offered to students who enroll at two of its elementary schools, Stanley and McCarver. These two schools are located in a predominantly minority-populated neighborhood. The manifest purpose of the program is to attract majority students to those two schools in sufficient numbers to achieve a desired level of racial distribution.

Because of the success of its voluntary magnet school program, though, the Tacoma School District has been forced to maintain a sizable waiting list of students who desire to attend one or the other of these two schools. At the time of trial, this list included 70 students who resided in zones which could be described as "nearest" or "next nearest" to one or the other of the two schools. Since the School District has refused to assign such students to either Stanley or McCarver (because to do so would upset the racial distribution in those two schools), its contention in this litigation has been that implementation of Initiative 350 in Tacoma will *require it* to assign them to one or the other of those schools, thereby disrupting the entire magnet school program and, ultimately, the entire District program for maintaining racial balance in Tacoma's schools.

There is a simple solution to the problem posed by the Tacoma School District, however. The solution is to be derived from the provisions of Initiative 350 itself.

The language of § 5 of Initiative 350 specifically disavows any legislative intent to interfere with operation of programs such as those at Stanley and McCarver Elementary Schools, by stating that:

> "The prohibitions of this chapter shall not preclude the establishment of schools offering specialized or

> enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students."

Beyond this though, there is another, more technical reason why Initiative 350 would not, by its own terms, interfere with the District's program. In its operation of the magnet school program, the District has necessarily established reasonable enrollment ceilings — using the race of the students involved as the criterion — which enable those magnet programs to achieve the desired result. The District can legitimately respond to objections raised by minority students who deem themselves deprived of their neighborhood school by pointing out that the nearest and next-nearest schools (*i.e.*, Stanley and McCarver Elementary Schools) would be rendered overcrowded within the meaning of § 1(3) of Initiative 350 if those students were assigned to either of those schools.

It should also be emphasized here that Dr. Eugene Tone, the sole witness called at trial by the Tacoma School District, testified that as many as 95% of the parents of school children with whom he comes into contact — majority and minority — favor a neighborhood school assignment policy (meaning, to them, assignment of public school students to the school closest to their place of residence). (J.A. 20-21; Tr. 392).

Initiative 350 thus imposes no "special burdens" on minorities in Tacoma. By its own terms, Initiative 350 simply has no impact at all on the Tacoma School District's successful voluntary program to maintain a desired racial balance of students in its public schools.

3. No Burdens Are Imposed On Minorities In The Seattle School District.

There is simply no question, of course, that Initiative 350 will drastically curtail further implementation of the Seattle School District's mandatory bussing program. But is even that a "special burden" within the meaning of *Hunter* and *Valtierra*? The answer is no!

In the first place, it is *analytically* impossible to define any "special burden" imposed by Initiative 350 in

the Seattle School District. The so-called Seattle Plan itself recites that it is "* * * equitable for both minority and non-minority families." Thus, the program itself has equitably distributed its burdens between minority and non-minority students and their families. The impact of Initiative 350 in Seattle — to the extent that it rescinds the mandatory extra-neighborhood assignment portion of the Seattle Plan — is thus proportional to those burdens "equitably" imposed on both minority and majority students and parents in the first place. Logically, then, it is impossible to define a "special" burden imposed on minorities by removing those burdens previously imposed by the District.

In more practical terms, though, this absence of any "special burden" imposed by Initiative 350 on minorities in the Seattle School District is graphically illustrated by the testimony of the Seattle School District Superintendent, Dr. David Moberly, who, like his counterparts in the Pasco and Tacoma School Districts, made it clear that minorities in the Seattle School District are not burdened in any sense by a statute which would require Washington school districts to adhere to a neighborhood school assignment policy:

> "A. * * * we have large numbers of minorities * * * opposed to desegregation. The Asian community, as I go out, I had concerns voiced about desegregation. I think, publicly, we have seen, recently, minorities at our Board meetings opposing desegregation * * * I think it is a false assumption on all of our parts to assume that only the majorities are opposed to desegregation. I think the population is mixed out there in viewpoints on it.
>
> "Q. When you say that they are opposed to desegregation, is that to desegregation as a whole or is this to the desegregation efforts, the mandatory aspects of desegregation?
>
> "A. I think the mandatory efforts, in other words, "busing." I haven't found anybody that really loves it.
>
> "Q. They go along with the idea of desegregation, but not forcing them onto a bus?
>
> "A. Not by busing. If you get out in your Asian community, your Black community, you will find alot

of opposition to it. It's not a popular thing." (J.A. 70-71).

The vote on Initiative 350 at the 1978 general election certainly bears out Dr. Moberly's personal experience. In the predominantly minority 37th legislative district in Seattle (one of only two legislative districts in the state where Initiative 350 did not receive the majority of votes), roughly 40% of the vote cast was in *favor* of the measure. (Ex. 105; Tr. 774). This vote followed a local opinion survey, taken earlier in 1978, which showed that roughly two-thirds of Seattle-area minorites opposed suggested mandatory bussing in Seattle. (Ex. 137; Tr. 2011).

We are not here suggesting that minorities consider an education in a racially imbalanced school to be better than, or even as good as, an education in a racially balanced school. *Rather, we are suggesting that they want the freedom to make that decision themselves, on an individual family-by-family basis.* That is precisely what Initiative 350 affords them; and that, we suggest, hardly constitutes the imposition of a special burden upon them. The evidence we have just described is relevant because it simply highlights this point.

To look at the matter from a somewhat different perspective: The critical issue in this case is not whether the Seattle School Board was right or wrong in believing that greater racial balance in a school — however that might be defined — "results" in a "better" education — however that too might be defined. Initiative 350 does not attempt to resolve that debate at all. Rather, it leaves the debate to be resolved on the family level. If a minority student believes that a better education can be obtained elsewhere than in his neighborhood school, Initiative 350 leaves the District free to allow that student to attend that other school. Indeed, this is happening very successfully in Tacoma. If, on the other hand, the minority student wants to stay in his or her neighborhood school, that option too is made available. Only the most condescending sort of paternalism can justify characterizing this as a "special burden."

D. In Investigating Whether Initiative 350 Somehow Imposes Special Burdens On Minorities In The Governmental Process, It Must Be Emphasized That Washington's Constitution Makes It The Responsibility Of The State — Not The Local School District — To Provide For The Education Of School Children.

The question whether Initiative 350 imposes special burdens on minorities within the governmental process has another aspect which must be examined.

The Ninth Circuit panel majority's opinion makes repeated reference to what it refers to as "traditional local authority" over educational policies (J.S. B-7), and finds that the initiative unconstitutionally overturns this authority.

The problem with that portion of the opinion, however, is that while the traditional *national* pattern may be as there described, that description has little to do with the relationship of local and state educational authorities in Washington State. Ironically, it was, in major part, the same group of plaintiff-appellees who sued many of the same defendant-appellants in December, 1975, claiming that the *state* had defaulted in *its* duty to "provide for a *general and uniform system* of public schools" pursuant to Article IX, § 2, of the Washington Constitution. In turn, the Washington Supreme Court agreed with that proposition. See, *Seattle School District No. 1, et al. v. State of Washington, et al.*, 90 Wn.2d 476, 585 P.2d 71 (1978).

The State Supreme Court there said:

> "* * *
>
> "The findings of fact demonstrate that Seattle School District No. 1 (District) must provide an educational program that complies with State statutes, regulations of the State Board of Education and the Superintendent of Public Instruction. * * *
>
> "* * * Moreover, the trial court declared that it is the duty of the Legislature to fully implement Const. art. 9 §§ 1 and 2, and to that end it is to: (A) define 'basic education' and determine the substantive content of the 'basic program of education'; and (B) provide for the fully sufficient and ample funding of

> the program by appropriation *or* through regular and dependable tax sources." (90 Wn.2d 476, 485-87).

In view of this decision, it will readily be seen that, in Washington, policy decisions regarding the operation of the state public school system, including the funding of *direct costs for school transportation, must* be made at the *state* and not the *local* level.

The simple fact is this. As a result of Seattle School District's successful suit against the State, the legislature in 1977 — in response to the trial court decision — *took into its own hands every basic policy decision regarding the operation of the public school (K-12) system* in the State of Washington, save one! It did not address the issues involved in Initiative 350. See, chapter 359, Laws of 1977, 1st Ex. Sess. (Basic Education Act of 1977) and chapter 325, Laws of 1977, 1st Ex. Sess. (Levy Lid Act). See, also, §§ 94, 96 and 97, chapter 339, Laws of 1977, 1st Ex. Sess. (Budget Act).

The amount of funding each school district will receive, from the State and from local sources as well, is controlled by the legislature. Effectively, the legislature controls also the average salary levels of school district staff and the staff/student ratios. Further, course offerings, in terms of both content and numbers of hours for various grade levels, are legislatively mandated. The number of hours the teacher must spend in the classroom is set by the legislature. The result of Seattle School District's victory was to have the legislature remove from its board — and from all other school boards in the State — the last major elements of "local control." Accordingly when the voters adopted Initiative 350 in 1978, they were simply following this pattern established in the prior year.

Thus, the Court of Appeals majority's suggestion that Initiative 350 amounted to a "radical restructuring" of the political process in Washington was simply wrong. The point deserving emphasis here, of course, is that there can really be no serious contention that the Washington governmental process has been skewed in a manner which imposes special burdens on minorities. The State has merely imposed statutory limits on the powers of its local

school districts (districts which would not exist but for the legislative charter granted them by the state legislature).

E. The Later Decisions Of This Court In Washington v. Davis, Village Of Arlington Heights v. Metroplitan Housing Development Corp., And Personnel Administrator Of Massachusetts v. Feeney Suggest That The Facial Analysis Employed In Hunter And Lee Is No Longer The Correct Approach To Be Taken.

Having concluded our examination of the analytical underpinnings of the decisions in *Hunter* and *Lee*, we next consider whether the more recent decisions of this Court limit the freedom of courts to utilize the analytical approach taken in those cases.

It seems beyond question that the courts below, in holding as they did, accepted the argument advanced by the school districts that *Hunter* and *Lee* represent a separate line of cases peculiarly applicable to legislative enactments dealing with racial matters. In our view, though, those decisions, though not overturned, have now been refined by several recent decisions of this Court. These later cases seem to us to make it quite clear that courts are no longer free to *presume* from the face of a given statute — as was done in *Hunter* and *Lee* — that an illicit segregative purpose motivated its passage. Such segregative purpose must now be separately proven by those challenging it. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights, et al. v. Metropolitan Housing Development Corporation, et al.*, 429 U.S. 252 (1977); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Cf. *City of Memphis v. Green*, 49 USLW 4389 (April 20, 1981).

Washington v. Davis, supra, involved a challenge to the validity of a written test given to District of Columbia police officer candidates. The plaintiffs there showed that the test had a profound discriminatory impact, effectively excluding a disproportionately high number of Black applicants. This Court held, however, that this was insuffi-

cient to make out a violation of the Fourteenth Amendment, saying:

> "* * * our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact. (426 U.S. at 239).
> "* * *
> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action.' *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205, 37 L.Ed.2d 548, 93 S.Ct. 2686 (1973). 'The differentiating factor between de jure segregation and so-called de facto segregation * * * is *purpose* or *intent* to segregate.' (426 U.S. at 240).
> "* * *
> "* * * we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. (426 U.S. at 242).
> "* * *
> "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of * * * statutes that may be more burdensome to the poor and to the average black than to the more affluent white." (426 U.S. at 248).

Washington v. Davis, was followed by *Village of Arlington Heights v. Metropolitan Housing Development Corp. supra*. The question involved in *Arlington Heights* was whether or not the refusal by a zoning board in a

Chicago suburb to allow construction of a low-income housing development amounted to discrimination on racial grounds. Citing *Davis*, this Court there reaffirmed that proof of discriminatory intent is required to make out a showing of invidious discrimination for Fourteenth Amendment purposes, saying, in part, at 429 U.S. 264-266:

> "Our decision last Term in *Washington v. Davis*, * * * made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.' *Id.*, at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases, the holding in *Davis* reaffirmed a principle well established in a variety of contexts. *E.g., Keyes v. School Dist. No. 1, Denver Colo.*, 413 U.S. 189, 208 (1973) (schools); * * *"
>
> "*Davis* does not require a plaintiff to prove that the challenged action rests solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, their judicial deference is no longer justified.
>
> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. * * *" 429 U.S. at 264-266. (Citations omitted)

Neither *Arlington Heights* nor *Washington v. Davis*, however, dealt with a statute. Thus, it remained arguable, even after these decisions, that *Hunter* and *Lee* stated the

controlling rule of law in challenges to purely legislative enactments which effectively created some sort of classification detrimentally affecting an identified homogeneous group. The validity of such an argument, however, was quickly dispelled by this Court's decision in *Personnel Administrator of Massachusetts v. Feeney.*

In *Feeney* a female state employee had passed a number of open competitive civil service examinations for better jobs but, because of a veterans preference statute, wound up ranked below male veterans who had achieved lower test scores. The statutory preference — available on its face to "any person, male or female, including a nurse" who was honorably discharged from the United States Armed Forces — clearly operated overwhelmingly to the advantage of males. The female employee challenged the statute, claiming that the preference formula violated the Fourteenth Amendment. A three-judge court initially declared the statute unconstitutional, stating that the preference statute's discriminatory impact upon women was so severe that it simply had to be struck down. *Anthony v. Commonwealth of Massachusetts,* 415 F.Supp. 485 (1976). On appeal, this Court vacated the judgment and remanded the case for further consideration in light of *Washington v. Davis. Massachusetts v. Feeney,* 434 U.S. 884 (1977). On remand, the District Court reaffirmed its original judgment on the basis that the consequences of the preference formula for the employment opportunities of women were simply too inevitable to have been "unintended." *Feeney v. Commonwealth of Massachusetts,* 451 F.Supp. 143 (1978). This Court again reversed, saying:

> The cases of Washington v. Davis, supra, and Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, recognize that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work. But those cases signalled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results. * * * Those principles apply with equal force to a case involving alleged gender discrimination. (442 U.S. 273, 274).
>
> "* * *

> "The dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation. * * * (442 U.S. 276).
>
> "'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. * * * It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group. * * *" (442 U.S. 279).

It should be emphasized here that the statute involved in *Feeney*, like Initiative 350, contained no *explicit* discriminatory classification in its text. In order to determine the presence of a discriminatory impact it was necessary there, as it is here, to resort to a factual analyis of the entire historical context in which the statute was adopted. *Feeney*, then, seems to make it clear that Initiative 350 is not subject to the sort of facial analysis employed by the three-judge court in *Lee v. Nyquist*, in particular.

In nevertheless resorting solely to that same analysis, the Ninth Circuit, in particular, has erred. As *Feeney* makes clear, a law such as Initiative 350 should be held unconstitutional only if it has been shown by those challenging it that the Washington electorate adopted it, at least in part, because of (rather than in spite of) a *collective deliberate* purpose to cause a racially discriminatory impact. In other words, it must first be shown that the Washington voters would not have selected or reaffirmed a modified neighborhood schools policy "but for" that policy's adverse effects upon identifiable minority groups.

II. THE DISTRICT COURTS FINDING THAT INITIATIVE 350 WAS ENACTED, IN PART, BECAUSE OF AN INTENT TO DISCRIMINATE ON RACIAL GROUNDS WAS WRONGLY PREMISED ON AN IPSO FACTO RATIONALE AND ITS CATEGORICAL DECLINATION EVEN

TO CONSIDER OFFERED EVIDENCE OF BENIGN SUBJECTIVE INTENT ON THE PART OF THE WASHINGTON ELECTORATE EFFECTIVELY THWARTED THE STATE DEFENDANT'S FACTUAL DEFENSE

As already noted, the Ninth Circuit based its affirmance of the District Court in this case solely on its own view that Initiative 350 created the same sort of racial classification which was found to be constitutionally objectionable in *Hunter* and *Lee*. It thus refused to inquire into the question of whether passage of Initiative 350 was the result of an intent or purpose to discriminate on racial grounds, the test most recently articulated by this Court.

On the other hand, the District Court did find that a purpose to discriminate on racial grounds was "a motivating factor" in the adoption of Initiative 350. Its approach to doing so, however, was simply not in keeping with that approach dictated by *Washington v. Davis* and its progeny.

In pertinent part, the District Court's memorandum opinion reads as follows:

> "As a second ground for holding Initiative 350 to be unconstitutional, I find that a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative.
> "* * *
> "It is, of course, impossible to ascertain the subjective intent of those who enacted Initiative 350. It was a measure adopted by the electorate at the ballot box. Unlike the normal legislative enactment there were no committee hearings or floor debates to cast light upon the intent of the enactors.
> "I believe that I can safely assume that a great many voters were motivated solely by a conviction that it was in the best interests of all children that they be permitted to attend their neighborhood schools; that there were many voters who were motivated solely by a desire to maintain as much racial separation as possible in the public schools; and that in between there were many voters who voted with varying degrees of mixed motives.
> "In deciding whether a racially discriminatory intent

> or purpose lay behind the adoption of Initiative 350, I cannot base my judgment upon what I believe I may 'safely assume' as to the subjective intent of the voters. As to that subjective intent the secret ballot raises an impenetrable barrier." (J.S. A-30,31).

In spite of this, the District Court then went on to find that a racially discriminatory purpose *was* a factor in the adoption of Initiative 350, relying almost solely on virtually uncontroverted evidence that most of the state's voters were aware that Initiative 350 was drafted in response to the Seattle Plan and that, if adopted, it would have the effect of curtailing its implementation.

The basic fallacy in this rationale is self-evident: mere opposition to mandatory bussing as a means to achieve racial balance is simply not the equivalent of the requisite intent to discriminate on racial grounds, both as a matter of law and as a matter of common sense. This latter proposition is borne out, in particular, by this Court's decision in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977). *Dayton* makes it clear that, absent a showing that a constitutional duty to remedy de jure segregation exists in the first place, even purposeful rescission of official action already taken to remedy racial imbalance in public schools does not amount to proof of intent to discriminate on racial grounds.

In *Dayton* this Court held that rescission by a later-reconstituted Dayton, Ohio School Board of a prior resolution of its predecessor board which had acknowledged a constitutional duty on the part of the school district to undo prior official segregative acts did not constitute evidence of present discriminatory intent, saying at 433 U.S. 414-15:

> "* * * The District Court's conclusion that the Board's rescission of previously adopted School Board resolutions was itself a constitutional violation is also of questionable validity.
>
> "* * * We agree with the Court of Appeals treatment of this action, wherein that court said:
>
> "The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound

> up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf., *Hunter v. Erickson*, 393 U.S. 385 * * * (1969); *Gomillion v. Lightfoot*, 364 U.S. 339 * * * (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the constitution. * * *"

Thus, in *Dayton* this Court seems to have affirmed the basic principle that mere opposition to mandatory racial balancing measures (absent a *de jure* segregation situation), even when coupled with official action retreating from such measures, simply does not equate with official discriminatory purpose in violation of the Fourteenth Amendment. *Cf., Higgins v. Board of Education of Grand Rapids*, 508 F.2d 779 (6th Cir. 1974); *Gomperts v. Chase*, 329 F.Supp. 1192 (N.D.Cal. 1971).

The same principle is to be derived from *Austin Independent School Dist. v. United States*, 429 U.S. 990 (1976), a *per curiam* decision of this Court which vacated and remanded a decision of the Fifth Circuit in which that Court had held that the evidence before it showed intentional discrimination against Mexican-American school children in Austin, Texas. On remand, the Court of Appeals, in *United States v. Texas Education Agency*, 564 F.2d 162 (5th Cir., 1977), interpreted the *per curiam* decision of this Court as follows, at 564 F.2d 169:

> "There is language in our [earlier] * * * opinion that an official discriminatory intent adequate to support a finding of *de jure* segregation could be inferred solely from the school board's use of a neighborhood school policy for student assignment. To the extent [our earlier decision] * * * can be so read, it is inconsistent with *Washington v. Davis* and *Arlington Heights*. The Supreme Court recognized this ambiguity in vacating our decision and remanding the case to us.
>
> The District Court's equating of the Washington elec-

torate's adherence to the state's traditional neighborhood schools assignment policy — even in outright opposition to programs such as that operated by the Seattle School District — with a purpose to discriminate on racial grounds is illogical and simply wrong.

The electorate, in consciously adhering to the traditional policy, was obviously motivated by the same intent as was the Austin school board. The Fifth Circuit's interpretation of this Court's remand in *Austin* squares with the rest of the numerous federal decisions on point. Until the decisions below were reached, no federal court had ever held that a simple decision to adhere to (or return to) a pre-existing racially-neutral neighborhood schools assignment policy — even in the teeth of counterpressure to undertake racial balancing measures — amounted to official discrimination on racial grounds. *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. den.* 389 U.S. 847 (1967); *Higgins v. Board of Education of Grand Rapids*, 508 F.2d 779 (6th Cir. 1974); *Diaz v. San Jose Unified School District*, 612 F.2d 411 (9th Cir. 1979). These decisions, of course, square with the pronouncements of this Court. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

The District Court's concomitant flat refusal — on a categorical basis — to consider the Defendants' evidence of benign intent on the part of the voting public was extremely prejudicial. It is this very evidence which reinforces the principle of *Dayton* — that opposition to the concept of race-conscious mandatory bussing is *not* the equivalent of an attempt to discriminate on racial grounds.

The District Court simply declined to delve into the subjective intent of the Washington voters on the state basis that "* * * the secret ballot raises an impenetrable barrier." (J.S. A-31). However, that sort of categorical refusal does not square at all with the direction given by this Court in *Dayton Board of Education v. Brinkman, supra* where the knotty problem of determining intent was dealt with as follows, at 433 U.S. 414:

"We realize, of course, that the task of fact finding in

> a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multi-membered public bodies are of necessity difficult, cf. *Arlington Heights v. Metropolitan Housing Development Corp.*, * * *"

The gravity of the District Court's incorrect approach becomes readily apparent upon review of the evidence which it deemed itself impenetrably barred from considering.

Received into evidence, but categorically excluded from consideration, were several public opinion polls evidencing a racially-benign subjective intent on the part of the Washington voters. One, a nationwide survey of racial attitudes, conducted by Louis Harris & Associates, demonstrated a genuine lack of segregative intent by members of the American white majority — an attitude particularly strong in the American West — coupled with equally sincere opposition to mandatory assignment of public school students to achieve racial balance. (Ex. A-133 at pp. 13-14, 42-43; Tr. 1346). The same poll showed that, on a nationwide basis, a plurality of black Americans oppose mandatory bussing as a desegregation remedy, a view which finds local reinforcement in one Washington opinion survey showing that Seattle area minorities expressed oppostion to suggested mandatory bussing in Seattle (Ex. A-127; Tr. 883, 886-888).

Published results of this latter poll, which appeared in the State's most widely-read newspaper (The Seattle Times), informed the electorate in early 1978, that roughly two-thirds of Seattle area *minority* parents opposed the imposition of a mandatory assignment plan for the purpose of alleviating racial imbalance in Seattle schools. On the other hand, the Seattle School District's own studies indicated that 71.2% of Seattle residents polled expressed an outright *preference* for living in a multi-racial neighborhood. (Ex. A-91; Tr. 1278).

In September of 1977, the Seattle School District Superintendent, in an open letter to parents of students in the District, described the District's voluntary magnet

school program as a "substantial success" which was "extremely encouraging." (Ex. A-59; Tr. 1019). Such a communication would logically incline any reader (*i.e.*, the average Seattle voter at the 1978 general election) to believe that a forced bussing program was therefore not required to alleviate any perceived racial imbalance. in Seattle schools.

There is other evidence in this record which also reflects that the Washington voters were not motivated by an intent to curb forced bussing solely for racial reasons. News articles carried in both major daily newspapers in the city of Spokane just prior to the 1978 general election contained reports of strong and vocal parental opposition to "bussing" in that Eastern Washington area which was entirely unrelated to race, *i.e.*, bussing to achieve desired levels of classroom balance. (Ex. A-130; Tr. 937). And on the west side of the State, less than a month before the election, the Bremerton Sun carried a report that the Central Kitsap School Board president favored passage of Initiative 350 in light of unnecessary bussing (again, for reasons unrelated to race) which had been undertaken in that District. (Ex. 117, p. 12; Tr. 574)

Advertising and public relations professionals called as witnesses by both appellants and appellees gave unrebutted substantive testimony that a statewide campaign in favor of a ballot proposition would actually *lose* support in the state of Washington if it was designed to appeal to segregative and racist attitudes. (Tr. pp. 496-498, 505-506, 509-511, 538, Ex. 2 Tr. 23).

The voting pattern on Initiative 350 is itself instructive. The initiative received a favorable vote in several school districts having minority populations in excess of the statewide average, where the school were already racially balanced due to residential patterns and neighborhood school assignment policies within those districts. (Ex. A-93; Ex. A-105; Tr. 774). A vote for Initiative 350 in those school districts was, then, a vote for maintenance of the racially balanced school system which already existed. To suggest that a vote in favor of the initiative in those districts was somehow motivated by an intent or purpose

to discriminate locally on racial grounds is utterly illogical.

It was the District's own witnesses, however, who presented the best evidence of benign subjective intent on the part of the electorate. They acknowledge repeatedly that a vast majority of parents — minority and majority — in all three school districts involved expressed, in one way or another, a preference for retention of the time-honored neighborhood school assignment policy. Seattle School Board member Bleakney testified, for example, that during the many public hearings dealing with the subject of racial imbalance in Seattle schools, the school board heard again and again that the parents wanted neighborhoods preserved. (Tr. 58, pp. 145-147). Dr. Tone of the Tacoma School District testified, as earlier noted, that as many as 95 percent of all parents — minority and majority — with whom he had been in contact expressed a preference for neighborhood schools (meaning, to them, the school "nearest" to their home). (J.A., pp. 20, 21). (Tr. pp. 391). And, again, Dr. Childers of the Pasco School District made it abundantly clear that attempts to lure East Pasco (*i.e.*, minority) residents to distant schools in the District were largely unsuccessful (thereby engendering school district regulations which now *require* minority kindergarteners to attend the most distant schools). (J.A., pp. 30, 31). (Tr. pp. 601-02). Dr. Childers also testified that if Initiative 350 is implemented in Pasco, East Pasco (*i.e.*, minority) residents would choose to have their children attend those two or three schools which are nearest and next-nearest (more or less) to the East Pasco area. (J.A., pp. 31, 53). (Tr. pp. 605, 634-38). In the Tacoma School District, notwithstanding an open, city-wide enrollment policy, at the time of trial only 1,200 students out of roughly 29,000 opted to attend non-neighborhood schools. (Ex. 99). (J.A., pp. 214).

The District Court simply ignored all of this admitted evidence — that bearing on the collective subjective intent of the electorate — and made no findings of fact whatsoever based on that evidence.

It must be remembered that, under *Washington v. Davis, supra*, and the cases which followed it, the districts

were burdened initially with proving that an intent to discriminate on racial grounds was a motivating factor in the adoption of Initiative 350. Following the refusal of the District Court to dismiss the District's complaint for failure to prove a *prima facie* case, the State defendants were, *at the very least*, entitled to have their best evidence — that showing that the collective motivation of the voting public was not as characterized by the Districts — weighed by the District Court and dealt with directly in its findings, conclusions and judgment.

III. INITIATIVE 350 REFLECTS A NATIONAL POLICY IN FAVOR OF NEIGHBORHOOD SCHOOL ASSIGNMENT MADE APPLICABLE BY CONGRESS TO DEPARTMENTS OF THE FEDERAL GOVERNMENT

In the preceding sections of this brief, we have emphasized two major points: (1) That Initiative 350 does not create a racial classification of the sort found constitutionally deficient in *Hunter* and *Lee* and; (2) that proof of discriminatory intent or purpose must be present before such state law may be struck down as violative of the Fourteenth Amendment. Generally in regard to either or both of these two points, there is an additional factor which certainly must also be taken into account. Throughout the entire course of this litigation the state defendants have repeatedly pointed out that Initiative 350 is nothing more than a state-level legislative parallel to an earlier 1974 act of Congress establishing a national neighborhood schools policy. Indeed, the evidence introduced at trial demonstrated conclusively that Initiative 350 was deliberately patterned quite closely after those same provisions of federal law — the Equal Education Opportunities Act of 1974 (now codified as 20 U.S.C. § 1701, *et seq.*). The relevant provisions of that Act (which are printed of J.S. F-5) read as follows:

> "1701. **Congressional declarations of policy**
> "(a) The Congress declares it to be the policy of the United States that —

> "(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
> "(2) the neighborhood is the appropriate basis for determining public school assignments."

Congress then reinforced this substantive expression of policy in the Act by expressly limiting the geographical extent of *any* federally-ordered bussing of public school children to precisely the same geographical extent as that expressed in Initiative 350, saying in § 1714: * * *

> "(a) No court, department, or agency of the United States shall, pursuant to section 1713 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student."

Although the foregoing statute has been subject to scrutiny on several occasions, it has remained intact as an expression of congressional policy in favor of a nationwide neighborhood school policy. See e.g., *Morales v. Shannon*, 516 F.2d 411 (1975), cert. den., sub. nom Shannon v. Morales, 423 U.S. 1034 (1975); *Brinkman v. Gilligan*, 518 F.2d 853 (6th Cir., 1975), cert. den., sub. nom Dayton Bd. of Education v. Brinkman, 423 U.S. 1000 (1975).

The striking conclusion drawn from juxtaposition of Initiative 350 with the provisions of 20 U.S.C. § 1701, *et seq.*, is that, if Initiative 350 did create a racial classification, it was no different than that created by Congress. And likewise, if passage of Initiative 350 was motivated by a purpose to discriminate on racial grounds, then that purpose is no different from that which motivated Congress as well. Such comparisons are, by no means, an idle intellectual exercise. If Congress is empowered to enact legislation of this type without violating the Due Process Clause of the Fifth Amendment to the United States Constitution, then it cannot be said that the State of Washington somehow violates the Equal Protection Clause of the Fourteenth Amendment by seeking to achieve the same ultimate goal using the same essential

legislative formula. *Bolling v. Sharp*, 347 U.S. 497 (1954); *Hills v. Gautreaux*, 425 U.S. 284 (1976).

Indeed, in the recent case of *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir., 1980), the District of Columbia Circuit Court of Appeals reviewed the Congressional approach in the context of a challenge to certain Congressional appropriation bills preventing the Department of Health, Education and Welfare from withholding federal funds from school districts which subscribe to a neighborhood school assignment policy. In upholding the legislation, the Court of Appeals dealt with and rejected suggestions that the acts were unconstitutional based upon both of the points which we have emphasized in this brief — namely, (1) that the legislation created an illicit racial classification and, that (2) the underlying motivation for passage of the federal law was a purpose to discriminate on racial grounds.

The treatment of Initiative 350 by the courts below, then, is manifestly inconsistent with the treatment which has, to date, been accorded the provisions of the Equal Educational Opportunities Act of 1974 (20 U.S.C. § 1701, *et seq.*) by the federal courts. This inconsistency should not be continued. Washington's expression of a neighborhood schools policy should be upheld just as Congress's national policy has been.

IV. INITIATIVE 350 DOES NOT IMPOSE AN EXTRA AND UNCONSTITUTIONAL BURDEN ON SCHOOL DISTRICTS CONFRONTED WITH A DUTY TO CURE *DE JURE* SEGREGATION

A. The Initiative Does Not Prohibit Assignment Of Students To Remedy De Jure Segregation.

We again point out that, while the Ninth Circuit Court of Appeals limited its basis for decision (*i.e.*, to the existence of a racial classification in contravention of *Hunter* and *Lee*), the District Court also found Initiative 350 to be constitutionally deficient on yet another stated ground. The third and final basis for the District Court's

decision was stated as follows in its memorandum opinion:

> "I find that Initiative 350 is overly inclusive in that it prohibits school assignments to achieve racial balance even in a school district where there is *de jure* segregation, that is, segregation caused by prior governmental action." (J.S. A-35).

In so finding, the district court ignored entirely the interpretation of the initiative by the State, particularly (and most importantly) by the state officer charged in the first instance with its construction, the State Attorney General. That construction was stated clearly in the Trial Brief of State Defendants (CR 228) as follows:

> "Initiative 350, on its face, recognizes that constitutional imperatives may override its applicability in some situations.
>
> "Section Six of Initiative 350 provides:
>
> "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools.
>
> "The same sort of express disclaimer of infringement on the power of the courts has been held to validate the provisions of the Equal Educational Opportunities Act of 1974, 20 U.S. Code § 1701, *et seq.*, *supra*, by allowing the federal courts to deal with constitutional violations which have caused segregation within a given school system. *Evans v. Buchanan*, 416 F.Supp. 328 (1976); * * *
>
> "Thus, where a given Washington school district finds itself under a constitutional duty to override Initiative 350, it may certainly do so. The Initiative clearly contemplates in Section Six that its action will be upheld by any court of competent jurisdiction, assuming that such constitutional duty is found to exist. Until a given school district reaches that point, however, it must, as a municipal corporate creature of the State of Washington, attempt to achieve its goals within the limitations imposed by its own creator. Since the initiative expressly subordinates its central policy to constitutional imperatives, how can it conceivably be claimed to be unconstitutional on its face?
> "* * *"

The appellants — charged by the Complaint with enforcement of Initiative 350 — have insisted from the outset

upon a construction of the statute which recognizes and provides for the constitutional necessity to undertake mandatory desegregation steps in certain instances without first having to seek an authorizing court order of some sort.[8]

The District Court should never have dealt with this issue, and, having dealt with it at all, it clearly erred in finding the act "overly inclusive." Initiative 350, by its very terms, operates directly upon Washington school districts. All Washington school districts receive legal advice and counsel from the prosecuting attorneys in those counties in which the districts are located. RCW 36.27.020(2) and (3). Those prosecuting attorneys, in turn, are statutorily guided by the formal opinions of the state Attorney General. RCW 36.27.020(3); RCW 43.10.030. The construction of the act by the Attorney General is binding on the State, absent a contrary judicial determination. Furthermore, any state official acting pursuant to the advice of the Attorney General is protected from liability and will not be found to have violated his or her official oath, even though such action is later held to be invalid. *State ex rel. Day v. Martin*, 64 Wn.2d 511, 392 P.2d 435 (1964). The Attorney General is an appellant in this case. In light of all this, it becomes apparent that the appellee school districts raised a false issue to the District Court. The school districts commenced this action claiming that it was the appellants who were going to enforce Initiative 350 in a manner which would prevent them (*i.e.*, the Districts) from performing *their* constitutional duties. In response, the appellants flatly asserted that this was not true and that they, in turn, would not and did not so interpret the statute. To complete the anomaly, the school districts thereupon insisted that, notwithstanding the less restrictive interpretation placed upon the initiative by appellants, the District Court was somehow dutybound to adopt *their* interpretation of Initiative 350 (one which enhanced the likelihood that the initiative could be characterized as unconstitutional). In falling into this trap the

[8]Such a construction is well supported by legislative history. Tr. 1171, 1180, 1181.

District Court ignored the all too familiar rule (pointed out to it in the State's trial brief) that legislation will be interpreted, if at all possible, in a manner which will render it constitutional and that "the dangers of an approach to statutory construction which confines itself to the bare words of a statute" are to be avoided. *Lynch v. Overholser*, 369 U.S. 705 (1962).

The Court's "task is not to destroy the Act," but to construe it, if consistent with the will of the state, "so as to comport with constitutional limitations." *U.S. Civil Service Commission v. National Letter Carriers Association*, 413 U.S. 548, 571 (1973). Where, as here, the defendants are the "very state authorities entrusted with the definitive interpretation of the language" of the act including the State Attorney General, this Court should not "ignore these authoritative pronouncements in determining the breadth of a statute." Rather, it should accept that interpretation, "however we might construe that language were it left for us to do so." *Law Students Research Council v. Wadmond*, 401 U.S. 154, 162 (1971); *Broderick v. Oklahoma*, 413 U.S. 601, 617-618 (1973).

B. A Requirement Of Prior Judicial Determination Would Not Render The Act Unconstitutional.

Even if the appellee's interpretation of Initiative 350 is correct, however, the requirement that a triggering court order be obtained in order to implement forced bussing in any Washington school district would not, of itself, render the act constitutionally invalid. Such a requirement is, in reality, fully consistent with the thrust of numerous decisions of this Court. A brief review of the history of school desegregation law emphasizes this point.

At the time of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the test for determining the existence of *de jure* segregation was really quite rudimentary. If a state, by law, provided for separate school facilities for children of differing races, then a finding of *de jure* segregation was quite simple to make. The later expansion of the defintion of *de jure* segregation,

however, has made it increasingly difficult to determine whether a given state (or local school district) has committed acts which amount to the creation of a dual school system. See, e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). And, quite apart from determining whether or not segregation in any given school district was the result of purposeful official action, this Court has also grappled with the difficult proposition of determining when minority school children of one race are somehow isolated from the majority in sufficient numbers to trigger further inquiry into whether a remedy is required. *Spangler v. Pasadena Board of Education*, 427 U.S. 424 (1976).

In spite of the difficulty which this Court and the lower federal courts have had in coming to grips with such elusive concepts, it has been the consistent position of the appellee school districts in this litigation that, notwithstanding the fact that their essential purpose is to provide education, it is somehow *their exclusive province* to declare whether and to what extent *de jure* segregation exists within Washington's public schools, and, further, to declare the appropriate remedy therefore. In essence the districts argue that to limit the exercise of this "declaratory" power to the courts, would itself somehow violate the federal Constitution. Justice Powell in his opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978) disposes of that notion, where, in discussing the inappropriateness of this same role which was assumed by the University of California in determining the need for a remedial program to alleviate perceived racial injustice, he says:[9]

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[9]Justice Powell's wisdom is amply supported here by a recent report prepared by the Seattle School District itself. In "The Effect of the Seattle Plan For School Desegregation on Achievement Test Scores," published in August 1981, the District says: "The purpose of the Seattle Plan was to reduce racial imbalance in the schools. Achievement of the goal has demonstrated the Plan's success. Any effect of the Plan on achievement test scores is irrelevant to evaluation of the Seattle Plan itself." The effect of Initiative 350, of course, even if the appellee's and District Court's interpretation is correct, is to tell school administrators to limit themselves to their "broad mission," education, where achievement test scores are indeed relevant, and to leave the formulation of

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations. * * * (438 U.S. at 307).
>
> "* * * Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling jurisdiction for inflicting such harm.
>
> "Petitioner did not purport to have made *and is in no position to make such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality.* * * * (Emphasis supplied.) (438 U.S. at 308, 309.)

To place the Washington school districts in the same position as this Court found the University of California to be in simply does not violate any provision of the U.S. Constitution.

The inappropriateness of the appellee's position on this so-called "overbreadth" issue is further highlighted by the variant definitions of "segregation," "racial imbalance," and "racial isolation" utilized by the three school districts which are parties to this appeal. As was noted above, the Seattle School District defines "racial imbalance" as:

> "* * * the situation that exists when the combined minority student enrollment in a school exceeds the district-wide combined minority average by twenty percentage points, provided that the single minority enrollment * * * of no school will exceed fifty percent of the student body." (J.A. 50).

It takes no great exercise of the mind to imagine the absurd results which would obtain if the Seattle School District's definition of "racial imbalance" was to be equated, as a matter of law, with "segregation." Indeed this *same* level of racial distribution has been determined

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social policy to the legislature, and the adjudication of constitutional duties to the courts, when necessary.

to constitute "racial isolation" by the State Board of Education (J.A. 66) in a definition which has been adopted, by reference, by the Tacoma School District (J.A. 66). On the other hand, the Pasco School District has simply declared that a "segregated" school in its district is any school in which minority enrollment exceeds fifty percent of the student body, although its principal school officials readily concede that minority children are not "isolated" from majority students by virtue of such a numerical distribution of students. (Childers' testimony, J.A. 39-42).

In light of all these considerations, then, a requirement that any extra-neighborhood bussing for the purpose of achieving a desired level of distribution in Washington public schools must follow some sort of triggering court order is by no means an unreasonable or unconstitutional legislative judgment. In view of the historical judicial development of school desegregation law, it is not unusual or unsound that a court — and only a court — should make the initial determination that a condition of segregation exists in a given school district which must be cured by means of bussing.

Thus, the suggestion that Initiative Measure No. 350 is somehow "overly inclusive" because, in the view of its challengers, it does not contemplate that Washington school districts will be allowed to make binding legal judgments as to when *de jure* segregation does or does not exist is simply not an unconstitutional infirmity.

V. THE NINTH CIRCUIT PANEL ERRED IN REVERSING THE DISTRICT COURT'S DENIAL OF ATTORNEYS' FEES TO THE SCHOOL DISTRICTS

Following entry of its Findings of Fact, Conclusions of Law and memorandum Opinion, the District Court then considered several petitions for awards of attorneys' fees by the districts and the intervenors. In denying these requests, the District Court's Order recited, in pertinent part, as follows:

> "4. * * * this action was commenced not by private persons whose own civil rights had been violated but rather by three public bodies, the school districts of Seattle, Tacoma and Pasco. The financial concerns of these public bodies are hardly analogous to those of impecunious parents of school children whose civil rights may have been violated. Although the school districts do not have unlimited funds, they do, at least, have available to them public funds with which to prosecute litigation. The plaintiffs are to a very large extent financed by appropriations from the state. In part those appropriations are to defray administrative costs, including the legal expenses, of the plaintiff school districts. (J.S. C-2).

On appeal, the Court of Appeals concluded that the trial court had abused its discretion in refusing to award attorneys' fees to the school districts. In fact, the panel majority actually substituted its discretion for that of the District Court and concluded that it was unreasonable *not* to award fees to a school district created, controlled, and funded by the defendant. (J.S. B 15, 16).

A. The Court Of Appeals Judgment On Attorneys' Fees Itself Constitutes An Abuse Of Discretion.

The trial court recognized that this litigation had already been, and continues to be, largely funded by money appropriated for the school districts by the defendant state for purposes which include the conduct of this litigation. The Court of Appeals, however, concluded that refusing to require the state to reimburse school districts for their expenditure of *State* funds, enabling them to sue the *state*, was an abuse of discretion!

The Court thus adopted a rule which *requires* that the source of litigation funding be entirely ignored, and which encourages, as a matter of national policy, "double dipping" from public treasuries. In so holding the panel majority cavalierly gave the back of its hand to the District Court's findings and exercised its "discretion" in favor of a result which Congress almost certainly did not intend, and which, as the District Court found in this circumstance,

was not necessary in order to encourage enforcement of the Civil Rights laws.

B. The Court Of Appeals In Effect Injected Itself Into The State's Legislative Appropriation Process.

By awarding fees to the Seattle School District, the panel majority has, in effect, appropriated funds from the State's treasury in favor of a municipal corporation of the State, created, funded and controlled by the State, and deriving its existence and authority entirely from state law. It has, inescapably, made a decision with respect to the appropriate funding of state programs and the establishment of state legislative priorities. Such action by the Court (or by Congress, if indeed that is what it intended) constitutes an unwarranted interference in the State's "ability to function effectively in a federal system." *National League of Cities v. Usery*, 426 U.S. 833 (1976). While admittedly, *Usery*, is not dispositive in the case of a statute enacted pursuant to § 5 of the Fourteenth Amendment, rather than the Commerce Clause, its reasoning nevertheless is compelling under these circumstances and should guide the court here.

The trial court's refusal to award attorneys' fees was *not* an abuse of discretion. This Court should not depart from established standards of deference to the states in this area of internal fiscal policy, absent a showing of absolute necessity. See, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973).

C. It Is Doubtful That Appellee School Districts Even Fall Within The Ambit Of The Attorneys' Fees Statutes.

The Court of Appeals cited no authority for the proposition that municipal corporations — as creatures of statute — are even with the ambit of 42 U.S.C. § 1988 or 20 U.S.C. § 3205 so that they may, in this manner, demand additional public funds to replace those already furnished to them by the state legislature. Congress did not intend or even envision such a result.

In connection with the passage of 42 U.S.C. §1988, for

example, the Senate Report which accompanied the bill stated, in part, as follows:

> "All of the civil rights laws depend heavily upon *private* enforcement, and fee awards have proved an essential remedy if *private citizens* are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain. In many cases arising under our civil rights laws, *the citizen* who must sue to enforce the law has little or no money with which to hire a lawyer. If *private citizens* are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then *citizen* must have the opportunity to recover what it costs them to vindicate these rights in court." [1976 U.S. Code Cong. & Admin. News at page 5908.] [Emphasis supplied.]

The legislative policy in favor of subsidizing *private* litigants has uniformly been reaffirmed by the courts. The case most often cited in support of this general expression of Congressional policy is *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), decided before either of the statutes here involved was enacted.

The essence of this Court's reasoning was stated at 390 U.S. 402:

> "* * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees — not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, *to encourage individuals injured by racial discrimination* to seek judicial relief under Title II." (Emphasis supplied.)

The so-called "private attorney general" rationale for awards of attorneys' fees makes no sense in the present context. The original plaintiffs here were school districts — political subdivisions of the state, the operations of which are entirely publicly funded — not private citizens acting as "private attorneys general." That term itself connotes belief on the part of the courts that, when matters

are finally settled and it is the private plaintiffs who have prevailed, it is appropriate that the public treasury should be tapped to pay for litigation found to have been commenced in the public interest. But that is precisely what has happened here already. The language in the foregoing excerpts expressing concern about the "cost of private enforcement" has no application whatsoever in the situation where, as here, state-funded municipal corporations themselves seek the relief.

To summarize then, it seems amply clear that the Congressional purpose in enacting the various civil rights attorneys' fees statutes would not at all be served by allowing the school districts to replenish public funds already given them by the state for this very purpose.

If the Court of Appeals' view prevails, it may be counterproductive. States are today facing what can honestly be described as a fiscal crisis. The courts cannot fail to recognize this reality. Intense competition exists among worthwhile and important public programs for the use of increasingly scarce public dollars. The result of awards such as that of the Court below in this case may indeed be the withdrawal by the states of "legal services" funds from their subordinate public bodies and *other* publicly funded agencies; such as legal services organizations. To avoid the fiscal drain of "double dipping," state legislatures may choose to require those theretofore state-funded agencies to support their legal services efforts entirely -- or at least in significant part — from other sources. The fundamental purpose of the civil rights attorneys' fee statutes will thus not be fostered, but rather inhibited.

CONCLUSION

Initiative 350 is valid. It creates no impermissible special classification, was not motivated by a purpose to establish or foster a system of segregated schools and is not "overly inclusive." Alternatively, the school districts are entitled to no award of attorneys' fees.

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